

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

8:48 am, Nov 25, 2020
U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE

UNITED STATES OF AMERICA * Case No. 13-CR-00607 (JFB)
*
* Long Island Federal
v. * Courthouse
* 814 Federal Plaza
PHILLIP A. KENNER, et al., * Central Islip, NY 11222
*
Defendants. * November 23, 2020
*
* * * * *

TRANSCRIPT OF CRIMINAL CAUSE FOR
MOTION HEARING/ORAL ARGUMENT
BEFORE VISITING JUDGE JOSEPH F. BIANCO

APPEARANCES:

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1 (Proceedings commenced at 11:13 a.m.)

2 THE CLERK: Calling Criminal Case 13-CR-607, United
3 States of America v. Kenner and others.

4 Counsel, please state your appearances for the record.

5 MS. O'CONNOR: Assistant U.S. Attorney, Madeline
6 O'Connor for the United States. Also appearing for the United
7 States is Assistant U.S. Attorney, Diane Leonardo.

8 Good morning, Your Honor.

9 THE COURT: Good morning.

10 MR. KOSTOLAMPROS: Good morning, Your Honor. This
11 is George Kostolampros representing Danske Bank, and I'm here
12 with my colleagues, Doreen Martin, Xochitl Strohbehn, and
13 Kelly Weiner.

14 THE COURT: Good morning.

15 MR. KOSTOLAMPROS: Good morning.

16 MR. BRISSENDEN: Good morning, Your Honor. Matt
17 Brissenden, stand-by counsel for Mr. Kenner. Obviously
18 (indiscernible) this morning.

19 THE COURT: Good morning, Mr. Brissenden.

20 MR. TALKIN: Good morning, Your Honor. This is Sam
21 Talkin for Mr. Constantine, who is not on the phone.

22 THE COURT: All right. Good morning, Mr. Talkin.

23 MR. CONSTANTINE: And, Your Honor, I'm also on the
24 call. This is Tommy Constantine.

25 THE COURT: Oh, good morning, Mr. Constantine.

1 All right. I think we also have a number of other,
2 I think, interested parties who are listening in today. As
3 you -- as I think the lawyers know, the purpose of today's
4 call is to issue a law ruling that details regarding the
5 Court's reasoning.

6 I may also issue a written opinion to follow, but
7 obviously given the time pressures and issues that we all know
8 exist with respect to this forfeiture proceeding, I thought it
9 would be in everybody's interest for the Court to resolve as
10 many issues as it can resolve now and then address the
11 outstanding issues, and then follow it up if necessary with a
12 written opinion down the line.

13 First -- so, I just -- everyone bear with me. It
14 could take about 20 or 30 minutes for the Court to place its
15 ruling on the record, and then obviously I'll answer any
16 questions that anybody has regarding the ruling.

17 The first big -- the government moved to strike the
18 bank's October 28th surreply. I deny that request. I think
19 given the ongoing issues that were being briefed, it was
20 helpful to the Court to receive that and I did consider it.
21 I'll give the bottom line and that'll go through the reasons.

22 The court is granting summary judgment to the bank
23 with the exception of two issues which I think remain
24 outstanding, and I'll discuss with the parties how I wish to
25 proceed with respect to that, obviously considering

1 suggestions they have.

2 The first issue remains the amount of the claims
3 that are linked to the initial loan. There's been a back and
4 forth in the declarations about what the exact amount is. I
5 think the Court has to obviously address that issue.

6 And the other issue which the government has raised,
7 which I'm going to give them some, if they wish, some limited
8 additional discovery on, although I'll explain what my
9 concerns are with respect to their argument -- the issue is
10 whether or not -- whether the entire amount of the additional
11 loans that the bank made, whether or not they were bona fide
12 purchaser for value, or at some point that it seemed to
13 becoming an ongoing transaction, and included with that is
14 what happened after the 2015 protective order, when obviously
15 it was -- the bank knew that the government was seeking for
16 the forfeit the resort. So those are the two issues I'll
17 address at the conclusion of my ruling.

18 First, I note that the government pointed out that
19 there are numerous third-party petitions that have been
20 asserted to the forfeitable property, and the Court obviously
21 must weigh all those interests before determining priority of
22 the claims, and that government suggests that the Court should
23 hold off on its decision with respect to the bank.

24 Although the Court has considered and is continuing
25 to consider their interest, I agree with the bank that they

1 are differently situated. Nothing in their claims affects the
2 Court's need to determine whether many years ago the bank
3 secured a superior legal interest. None of those petitions
4 are asserting a claim that's superior to the bank's, because
5 the other petitions assert interest that are in the -- the
6 bank referred to it out of money equity interest and none
7 assert a secured lien in the resort property.

8 So I believe the Court can proceed with this ruling
9 while it continues to consider their petitions, and as the
10 bank notes, if I have any concerns regarding that, I can await
11 amending the preliminary order of forfeiture until I decide
12 the validity of those other claims.

13 With respect to the standard the Court is applying
14 here, I won't repeat it. I'll give a summary of it, but I
15 adopt -- Judge Koeltl did an excellent job of thoroughly
16 setting out the standard in a case called *U.S. v. King*, 2012,
17 Westlaw, 226-1117, Southern District of New York, June 18 of
18 2012. I adopt it in its entirety. I just summarize it for
19 purposes of framing the Court's oral decision today.

20 Obviously, the criminal forfeiture proceedings are
21 governed by Section 853 of Title 21 and Federal Rule of
22 Criminal Procedure 32.2. Following a conviction, the Court
23 must determine what property is subject to forfeiture under
24 the applicable statute, and to the preliminary order
25 forfeiture, which the Court has done here, that sets forth the

1 amount of any money judgment threatening to forfeiture of
2 specific property, and that's all set forth in Criminal Rule
3 of Procedure 32.2(b)(1)(A) and (b)(2)(A).

4 This preliminary order of forfeiture is entered
5 without regard to any third-party interest in the property.
6 The determination of whether a third party has such an
7 interest is deferred until the ancillary proceeding under the
8 rule, and an ancillary proceeding provides an exclusive means
9 by which a third-party can claim an interest in the property
10 subject to forfeiture.

11 The Second Circuit has discussed this in *DSI*
12 *Associates, LLC v. United States*, 496 F3d 175, Second Circuit
13 2007, and the third party obviously has to assert an interest
14 in a petition that the Court can adjudicate the validity of
15 under section 853(n)(2).

16 The petitioner must first establish standing to
17 challenge the forfeiture order by demonstrating a legal
18 interest in the forfeited property under 853(n)(2).

19 The petitioner must prove its entitlement to relief
20 by establishing through a preponderance of the evidence, one
21 of two superior claims to that property under 853(n)(6).
22 (n)(6)(A) is not applicable here.

23 We are all focused on (n)(b)(B), where the
24 petitioner must demonstrate that it is a bona fide purchaser
25 for value of the right and title of interest to the property

1 and was at the time of the purchase redeemed without cause to
2 believe that the property was subject to the forfeiture.

3 The Second Circuit has discussed this in the *United*
4 *States v. Watts*, among other cases, 786 F.3d 152, at page 160,
5 Second Circuit, 2015.

6 If the petitioner meets that burden, the forfeiture
7 order must be amended to exempt for third-party interest.
8 Conversely, if the petitioner cannot show that the condition
9 applies then obviously there is -- cannot -- they cannot
10 demonstrate a valid interest in the property subject to
11 forfeiture. Once this ancillary proceeding concludes, the
12 Court enters its final order forfeiture which is final then,
13 with respect to all third parties.

14 With respect to the standard on summary judgment
15 motion, the law is clear that the Court, under rule
16 32(c)(1)(B) can dispose of third-party petitions without a
17 hearing by allowing the parties to file motions for summary
18 judgment and obtain rules that are applicable in several cases
19 -- generally are applicable in this context. The Second
20 Circuit made that clear in a case called *Pacheco*, 393 F.3d at
21 pages 351 and 52.

22 In this case, obviously, the government has first
23 requested additional discovery before the summary judgment
24 motions were decided, and I'll address that in a moment, some
25 of which I'm granting. But both sides have filed cross-

1 motions for summary judgment.

2 New York law determines the respective interests
3 held by the petitioner and the defendant and federal law
4 determines whether the petitioner's interest satisfies the
5 requirement for Section 853(n)(6).

6 Moving to the elements of 853(n)(6)(B), as I noted
7 earlier. If the -- it provides that a person or an entity who
8 acquired an interest in the forfeited property after the
9 government's interest vested may nevertheless prevail in the
10 ancillary proceeding, or that the bona fide purchaser of
11 value. The defense consists of the following three elements.

12 One, the claimant has a legal interest in the
13 forfeited property. Two, the interest was acquired as a bona
14 fide purchaser for value. And three, the interest was
15 acquired at a time when the claimant was reasonably without
16 cause to believe that the property was subject to forfeiture.

17 This is discussed in detail in a case the Second
18 Circuit has pointed favorably to, *United States v. Kinley*, 507
19 F.3d, 1125. I think there's 1130 and 31 Eighth Circuit, 2007.

20 The Court concludes that Danske Bank is entitled to
21 summary judgment with respect to this defense, except for the
22 two outstanding factual issues that I have identified. This
23 is the basis for the Court's ruling.

24 First, with respect to the legal interest in the
25 forfeited property, and upon the issue of whether it was

1 acquired as a bona fide purchaser for value, in terms of the
2 evidence that the bank has submitted, it establishes that the
3 bank and Lehman entered into a master repurchase agreement in
4 1999 and committed repurchase facility agreement in 2005.

5 Under the 2005 agreement, the bank gave
6 approximately \$800 million to purchase commercial mortgage
7 loans from Lehman that Lehman agreed to repurchase at a later
8 date.

9 The bank obtained title to a pool of collateral
10 consisting of liens secured by commercial real estate upon
11 purchase through -- though Lehman retained the right to
12 receive the income.

13 With respect to the property at issue here -- and
14 I'll come back to this, the nature of the collateral rolling
15 over every seven days -- but moving to the basis for the Court
16 concluding that the bank does have a legal interest, the
17 perspective -- and it was for value under that agreement and
18 the money that was paid pursuant to that agreement.

19 On September 15th of 2008, Lehman filed for
20 bankruptcy and defaulted under the MRA. That same day, the
21 Bank of New York as custodian, sent a letter detailing the
22 collateral that the bank had purchased under the repo
23 agreements that was held for the bank's benefit. That's
24 Exhibit 32 of the bank's summary judgment motion.

25 The DCSL loan was among the collateral on page 30 of

1 31. Because of Lehman default, the bank was entitled to
2 retain some or all the assets in the collateral pool and use
3 the value of that collateral to offset the amount that Lehman
4 owed under the repo agreement.

5 The bank elected to retain Lehman's interest in the
6 resort property and equity interests. In January of 2009,
7 banks and Lehman executed the omnibus assignment and
8 assumption agreement which confirmed that the bank had
9 acquired all of Lehman's protected senior interest in the
10 resort property as first place beneficiary under the Mexican
11 Trust agreement and equity interest for, quote, "good and
12 valuable consideration," end of quote.

13 The Court believes that this establishes that they
14 have this legal interest in the property, that they were a
15 bonafide purchaser for value with respect to that. Any
16 question regarding that in the Court's view, although I don't
17 believe there is any based upon that documentation, is
18 completely dispelled by what occurred in the bankruptcy
19 proceedings in September, 2009.

20 The bank filed a claim in Lehman's bankruptcy to
21 recover the amount Lehman owed. The bank, after the bank set
22 off the amount owed by the value of the pool of collateral
23 consisting of Lehman's secured by the commercial real estate,
24 that bank had retained and a settlement was reached in which
25 the bank perfected its interest in resort property and the

1 equity interests.

2 This was recognized by the bankruptcy court and
3 discussed in the papers and was discussed at oral argument.

4 The bankruptcy court recognized the bank's prior purchase of
5 Lehman's interest in the resort property.

6 The bankruptcy court recognized that the bank is the
7 owner of the mortgage assets, including the BS DCSL loan.

8 That was in, I believe, in an October 25, 2010 order. And the
9 Tremont records, which I find to be properly authenticated, at
10 a minimum show that Lehman owned at least \$100 million to DCSL
11 pursuant to the arrangement.

12 The Court views all of this evidence as
13 uncontested that the bank purchased the loans secured by
14 the underlying property as evidenced by the terms of the MRA,
15 the money paid out under the MRA, the Bank of New York trust
16 receipts, and by the settlement agreement and order that the
17 bank -- the bank's deficiency claim in the bankruptcy
18 proceedings.

19 Although the government attempts to dispute that and
20 seeks additional discovery and documents with respect to that,
21 it's the Court's view that no amount of discovery will change
22 those facts.

23 The government's key argument is that the failure to
24 know the date and the amount of the transaction for that
25 particular loan creates a material issue of fact.

1 Their view is that you need to have a document that
2 the bank purchased the initial loan on a particular day for a
3 particular amount of consideration in order for the Court to
4 be able to decide this issue.

5 I disagree. I think the other documents and the
6 decision of the bankruptcy courts unequivocally demonstrate
7 that the bank received an interest in the loan, and in the
8 property for consideration.

9 This is, I think, highlighted as I mentioned a
10 moment ago, and the bank points out in its documents, that
11 they've got their lack of documentation of a particular day is
12 by virtue of the nature of the arrangement, that the
13 collateral constantly being transferred, the collateral pool
14 rolled over ever week, the government takes that fact and says
15 well, it could be that they didn't have this property, but the
16 other documents unequivocally refute that.

17 Both -- the Court did not believe any additional
18 discovery is needed on this and the bank is entitled to
19 summary judgment on this issue in its favor.

20 By September 12th of 2008, Lehman perfected senior
21 liens against a resort property, was one of the assets held by
22 the bank, and without question the bank acquired perfected
23 secured senior interest in the resort property and equity
24 interest no later than January of 2009.

25 For the same reason, the Court rejects the

1 government's argument that the bank has failed to satisfy the
2 pleading requirements of 853(n) because they don't have an
3 exact -- you know, for how much. I don't believe they need to
4 plead that or to prove it for the reasons I've already
5 indicated.

6 Similarly, the government argues that even if the
7 bank proves it gave value for the initial loan in its
8 transactions with Lehman, which the Court finds to be the case
9 based upon uncontroverted evidence, and assuming arguendo, if
10 I were to find that it was -- that this should be considered a
11 bona fide purchaser for value with respect to that, which
12 again the Court finds to be the case, the government argues
13 under the principle of judicial estoppel, the bank's claim to
14 the initial loan must be limited to the value that the bank
15 attributed to the initial loan when it settled with Lehman in
16 the bankruptcy proceeding.

17 The Court disagrees. The bank purchased the loan
18 secured by the underlying property, as evidenced as I said, by
19 the -- by the documentation that I've already gone through.

20 I agree with the bank that it was not paying for a
21 secured interest in the loan where the claim was limited to
22 the amount against valued for DCSL loan in the Lehman
23 bankruptcy.

24 I further agree with the bank that the government's
25 argument would make every secured interest by a lender like a

1 bank in a forfeiture proceeding, limited to what the lender
2 valued the loan at the time it acquired its interest.

3 I see no basis for that in the law; no basis for
4 estoppel to apply in this manner for such a settlement with
5 respect to a claim in bankruptcy. I believe that the analysis
6 that the bank supplied in the *Dryer* case is persuasive to me
7 in this type of situation, F9 51, F.Supp 2d, 582, Southern
8 District of New York, 2013.

9 With regard to the area of factual dispute that I
10 think remains, and I think the parties are aware of this from
11 the papers, there is a factual dispute regarding the amount of
12 that claim.

13 The bank asserts that in early 2009 borrower owed
14 Lehman \$107,538,327.83 in principal, and over \$49 million in
15 unpaid accrued interest. The government notes that the
16 Tremont records only establish that Lehman loan, and owes
17 \$100,240,922 to the resort that remained a factual issue that
18 the Court needs to resolve, obviously, before completing --
19 ability to address the bank's summary judgment motion. I'll
20 discuss that with the parties at the -- at the end.

21 Moving to the additional loans and these same
22 elements with respect to the additional loans. First, the
23 government argues that because the bank has not proven that it
24 acquired a valid interest in the initial loan I necessarily
25 found that the bank has not proven the required valid interest

1 in the additional loans, which were merely funds loaned under
2 modifications to the initial loan agreement.

3 Obviously, because I've disagreed with the
4 government's analysis regarding the validity of the interest
5 in the initial loan, I concluded that the argument has no
6 weight and that the bank does have a valid interest in the
7 additional loans by virtue of an interest in the initial loan,
8 and I don't think there's any argument that the money, the \$98
9 million, was advanced to the resort under the additional loans
10 and that the -- I believe the bank has a valid interest, and
11 certainly as the bonafide purchaser for value, at least to
12 some extent, with respect to that \$98 million.

13 The only remaining issues that are -- as it relates
14 to that, is the issue raised by the government that are at
15 some point, that the bank seems to become a bonafide purchaser
16 of value with respect to the additional loans. The
17 government's argument in essence is that the bank was not a
18 bona fide purchaser of value of the additional loans because
19 the additional loans were not innocent arm's length
20 transactions.

21 The government argues that the bank and Mr. Jowdy
22 had some arrangement through which Jowdy would permit the bank
23 to systematically deplete the equity in the resort, the
24 modified loan agreement would subsequently increase the
25 resort's debt without the bank having to advance any new

1 funds, while the bank in return made no effort determine that
2 the loan funds were being used for their intended purpose for
3 the benefit of -- that would be, obviously, for the benefit of
4 the resort and not for Mr. Jowdy personally, or for other
5 entities controlled by Mr. Jowdy, and that they also promised
6 to pay a substantial sum upon the sale of the resort through a
7 foreclosure, or actually the bank recovers investment through
8 a forfeiture sale.

9 Before deciding that issue, I'll say a couple of
10 things. First of all, the bank obviously has responded in
11 great detail to that, including declarations from Mr. Daniel
12 and Mr. Devlin, and they have pointed out, among other things,
13 and I have gone back and looked at the fact that with respect
14 to the arrangements Mr. Jowdy and his interest and what he --
15 interests he would get upon any forfeiture or sale, Mr.
16 Kostolampros pointed that out in Government Exhibit 20, an
17 August 23rd, 2018 letter.

18 The bank explained in great detail what it planned
19 to do with the facility B, and also attached a proposed
20 agreement including their arrangement with Mr. Jowdy, and the
21 bank points out that the government expressed no concern, and
22 obviously the government, in the supplemental phase, can -- I
23 don't think to this date the government has pointed the Court
24 to anything suggesting that when they saw this, they objected
25 to this as not being a arm's length transaction.

1 They've attached no declaration from any industry
2 experts that suggest that what the bank was doing here would
3 be indicative of a lack of an ongoing transaction by a bank in
4 this type of situation.

5 The bank points out that if it did not fund the
6 facility C, that -- and the resort went under, they could
7 potentially be viewed as a -- in violation of the Court's
8 protective order, and the government never suggested that they
9 should stop their funding.

10 So these are all the issues that I see in the
11 papers, but I'm going to give the government some limited --
12 and I emphasize limited -- additional discovery on this issue.

13 For example, if they wish to, by doing some type of
14 video deposition of Mr. Devlin through reviewed -- by way of
15 his declarations, that he reviewed and conducted diligence in
16 every (indiscernible) request, that would be potentially
17 something the government could do before the Court addressed
18 this issue.

19 The Court also -- this issue regarding -- it's the
20 bank's position, and it seems to be borne out by the
21 documentation, that all the money advanced, the \$50 million
22 advanced after the Court issued -- I mean, excuse me, after
23 the government filed its bill of particulars regarding the
24 resorts was pursuant to agreements that have already been
25 entered into prior to that date under the new facility C in

1 April 2014.

2 So it's not clear to me what would be the basis,
3 other than this issue regarding the lack of an ongoing
4 transaction, of not allowing the additional 50 -- \$50 million
5 to also be the subject and the superior interest by the bank.

6 But in any event, the Court is willing to allow some
7 limited additional discovery on that issue.

8 The final element, whether or not the interest was
9 required at a time when the claimant was reasonably without
10 cause to believe that the property was subject to forfeiture,
11 obviously, we're talking about here the loan extension, the
12 modifications between 2009 to 2014 following the assignment of
13 the initial loan. And in 2009, the government again seeks
14 additional discovery on this, but I'm denying any additional
15 discovery on this.

16 First I note the bank, pursuant to this back and
17 forth regarding the limited discovery that's already been
18 provided, they provided what they say are the existing due
19 diligence reports as it relates to their investigation of the
20 resort and any issues regarding the resort while it was
21 extending the loans and the modifications for the loan.

22 They represented to the Court that no such other due
23 diligence report exist. They've obviously submitted, as I
24 noted, the affidavit of Mr. Daniels with respect to this
25 issue.

1 The government does not allege that the bank had any
2 direct knowledge from Mr. Kenner or Mr. Constantine, or anyone
3 else that I'm aware of, regarding fraud when they, you know,
4 acquired the interest or expended the loans and the
5 modifications to that.

6 What the government relies on here are various
7 allegations in civil lawsuits dating back to 2008. Mr.
8 Genow's (ph) lawsuits alleging that Jowdy and defendants
9 misappropriated or averted funds loaned by Genow for the
10 resort, and they noted Jowdy walks in in 2010 against several
11 victims.

12 Where paragraph 32 refers to Kenner borrowing \$2.5
13 million from hockey player clients, and then they note overall
14 of approximately two dozen news articles and press releases
15 between 2008 and 2013 regarding the lawsuits and alleged
16 fraudulent conduct, and they note in one of the loan
17 agreements signed by Mr. Daniels and Mr. Nunez gives some
18 notation of the possibility that there could be Kenner parties
19 who join in litigation.

20 I conclude no discovery is needed on this issue
21 because I am assuming the bank knew about all these
22 allegations in these civil lawsuits and press releases and
23 newspaper articles at the time of the relevant events
24 regarding them acquiring their interests, and I find that this
25 is insufficient to meet the standard as a matter of law.

1 I note, first of all, the Jowdy complainant wasn't
2 the hockey player clients who agreed to give Kenner their
3 money for the project and got an interest in CSL properties,
4 and that it focused on false allegations of fraud against
5 Jowdy. It's, you know, in terms of putting someone on notice,
6 I don't think it does a lot.

7 But in any event, with respect to Mr. Genow's
8 lawsuit and the other allegations, I find that there be no
9 reason to believe that this farm resort in Mexico would be
10 someday subject to forfeiture by the United States Government,
11 based upon all those allegations.

12 I highlight that the government did not even know in
13 2013 at the time of the indictment, even with all the civil
14 lawsuit allegations, even with the law -- resort -- the
15 resources of law enforcement, and what I would imagine to have
16 been a thorough grand jury investigation, the government in
17 2013 did not even identify the property as subject to
18 forfeiture in the indictment.

19 I think it's quite logical to say, if the government
20 did not realize that at that time, how could the bank at -- I
21 should note, at the low standard that would be required for
22 them to put that in an indictment, how could the bank
23 reasonably know that it would -- in fact, one could argue that
24 it concluded -- it could reasonably allow a bank or some other
25 third party looking at the indictment to conclude the

1 opposite, that the fact the government didn't put that in
2 there in 2013 may suggest otherwise with respect to its
3 forfeitability.

4 The bill of particulars with the notice about the
5 resort was not filed until April 2015, and so I find in that
6 period prior to 2015 that this standard cannot possibly be
7 met, which is consistent with the case law that was cited in
8 the papers, *United States v. Watts*, which I've referred to
9 earlier, 786 F.3d 152, Second Circuit, 2015.

10 In that case the court, Second Circuit, concluded
11 that the third party lacked reasonable cause after the court -
12 - even though the government had identified it as subject to
13 forfeiture where the Court found no probable cause to restrain
14 the funds at a *Monsanto* hearing.

15 As I noted, we're even further removed from that
16 because here, even in 2013, the government unsealed the
17 indictment charging fraud with forfeiture.

18 The bank would have no reasonable cause to believe
19 that the resort, at that point, is subject to forfeiture given
20 its absence from the indictment or other indications from the
21 government that it was being contemplated.

22 To the extent the government cites other cases, this
23 case is clearly distinguishable from all those cases,
24 including *United States v. Rodriguez*, Southern District of New
25 York, 2019, where an assignment of a mortgage had constructive

1 notice, where the assignment occurred after, and I emphasize
2 after, the government filed a notice of pendency to identify
3 the entire parcel of property as subject to forfeiture.

4 The *Sabatino* case in Southern District of Florida
5 involved a porn broker purchasing luxury (indiscernible) all
6 sorts of warning flags that those items were stolen. That
7 clearly is not analogous to this fact pattern.

8 And the *U.S. v. BCCI Holdings* case, the District of
9 Columbia in 1997, where there are an incredible number of not
10 only newspaper articles that indicated fraud, but there's a
11 guilty plea to money laundering by BCCI, which was enough, the
12 Court concluded, to put American Express Bank on notice.

13 None of those cases apply here, and in fact, the
14 cases that say it's not enough are more consistent with the
15 fact pattern here.

16 *United States v. Petters*, District of Minnesota,
17 2013, where a court conclude that newspapers were not enough
18 to put a third party on notice. Generalized knowledge of
19 fraud is not enough.

20 And in *United States v. Cox*, Western District of
21 North Carolina, 2007, the fact that the government --
22 knowledge of a government investigation is also not enough.

23 So that's the Court's conclusion with respect to
24 that issue. I think the bank is entitled to summary judgment
25 on that. Again, with a caveat regarding this bona fide

1 purchaser of value issued with respect to the additional loans
2 and the time period after the bill of particulars was filed.

3 All right. So that's the ruling of the Court.

4 Let me just ask the government or the bank if you
5 have any questions regarding the scope of the Court's ruling.

6 The government have any questions?

7 MS. O'CONNOR: Yes, Your Honor.

8 Could you just clarify in terms of the \$50 million
9 you were discussing, what you meant (indiscernible) permitted
10 to discuss?

11 THE COURT: I didn't hear what -- just repeat that
12 again.

13 MS. O'CONNOR: Sorry. I said, could you just
14 clarify for the government what -- the authority we have to
15 conduct discovery regarding 50 million?

16 THE COURT: Yeah, the -- well, I guess it
17 (indiscernible) the 50 million. The government has put this
18 theory out there that the bank was not a bona fide purchaser
19 of value because of the nature that essentially it was
20 extending money to the bank, running up the debt, letting Mr.
21 Jowdy do -- spend the money without due diligence as to
22 whether or not it was going into their resort.

23 They've obviously put in a lot of documentation
24 already. The government -- if you said the government wants
25 every receipt, that's not happening.

1 I don't think in this context, requiring the bank to
2 produce every single receipt for every expense on that resort
3 for years and years and years is necessary to confirm whether
4 or not, in fact, this is an issue in this case.

5 But I'm suggesting that -- and again, if the
6 government wants to propose to the Court some other way of
7 doing this, my -- just reading through the papers, and the
8 bank has said they already made Mr. Devlin available formally
9 to the government, but that the government wanted to take some
10 video deposition of Mr. Devlin, or informally, I'll leave it
11 up to the government, to test the declaration as to what
12 diligence he was providing with respect to the money being
13 given to the resort over the years, I would allow something
14 along those lines.

15 It seems to me -- I went through -- you know, and
16 this is a difficult thing, obviously, for me to do because of
17 the incredible amount of details that went back and forth, but
18 I did look at your expert (indiscernible) declarations,
19 supplemental declaration.

20 It seems to me the bank has responded, and most of
21 the things that she thought were missing or something amiss, I
22 guess is the best way of putting it, but if there is some
23 limited category of documents or gaps in the documentation,
24 the government still wants it with respect to these additional
25 loans. I'd be willing to consider it, but I emphasize,

1 limited.

2 And with respect to the \$50 million after the
3 protective order, I don't know what additional -- you know, I
4 have to be (indiscernible), you know, Agent Galioto wrote in
5 his supplemental declaration that, you know, he told the bank
6 -- it's in paragraph 6 -- that we did not view the bank as a
7 bona fide purchaser for value for the money it loaned after
8 the bill of particulars was filed.

9 You know, I'm having a hard time understanding that
10 whole dynamic, because obviously this was happening while
11 everybody was before the Court and I mean, I'm a little
12 confused as to how the government is arguing -- if in fact all
13 this money was extended pursuant to agreements prior to these
14 bill of particulars, if in fact the court entered a protective
15 order trying to preserve the value of the property, and if the
16 government never -- the bank suggested, and I don't think the
17 government has ever disputed that the government wanted the
18 bank to continue to fund the property.

19 To the extent the bank suggested they're going to
20 foreclose on the property, the government was suggesting that
21 that would be an inappropriate thing to do; that it could
22 destroy the value, the forfeiture value of the property, for
23 the bank to foreclose on it.

24 So I guess my answer to your question -- I'm not
25 sure what, you know, discovery I would allow on that issue. I

1 don't, you know -- I don't -- I'm not even sure of any
2 disputes between what was said at those meetings is going to
3 be material in light of what's undisputed about those
4 meetings, but I'm giving you my -- I'm opening my mind to you
5 and you can suggest to me some category of limited discovery
6 on that if you want to. Okay?

7 MS. O'CONNOR: Thank you.

8 THE COURT: All right. Does the bank have any --
9 Mr. Kostolampros, do you have any questions about the Court's
10 ruling or what I'm asking the parties to do?

11 MR. KOSTOLAMPROS: Yes, Your Honor. We have a
12 couple of questions.

13 I think it would help the parties to move on, you
14 know, from here, considering their options if we -- I'm a
15 little bit unclear on the exact amounts that the Court is sort
16 of recognizing here. And if you bear with me, I'd like to
17 just go through our claim, you know, the various parts.

18 And one is the facility A, which principal balance
19 is 96.4, and this arises from the Lehman interest that Danske
20 purchased.

21 And if I have the Court correct, I think your -- you
22 set aside at least some portion of that for potential
23 discovery as to the dispute raised by the government's
24 consultant as to -- I think it was a little over \$6 million of
25 that original 106 or \$7 million interest. So I wanted to be

1 clear on that.

2 And then secondly, facility B, which is an
3 additional \$18 million, that was extended in March of 2009 and
4 remains not -- unpaid. So that's an additional 18 million.

5 And then as you recall, there is a \$50 million
6 profit participation fee, and the government, from my
7 understanding of its consultant's declaration, is challenging
8 \$5 million of that 50 million.

9 So obviously, if you were to add the 96.4 million
10 that we have outstanding, minus the 60, then the 18 and the
11 50, you get -- you get Danske's claim well into over \$100
12 million at this point. And I think it would be helpful for us
13 going forward to understand if I have that right, or if I'm
14 missing something there.

15 THE COURT: Well, I was trying to do that on my own
16 and is has been difficult, frankly, for me to try to figure
17 out what -- based upon my rulings, what amount would not be
18 disputed at this point, and what would be remaining.

19 And you know, I would -- my preference would be for
20 you to -- and I, you know, hesitate to even say this given how
21 unsuccessful efforts have been you and the government to have
22 a dialog about it.

23 But I'm hoping -- my goal today was to rule on what
24 I can rule on, and then try to figure out how much of the bank
25 claim that takes out of the equation and what's remaining.

1 So I'm willing to give you an answer on that, but I
2 would rather you set out what you believe, based upon my
3 rulings, would be the minimum amount the bank would be
4 entitled to at this point, and see what's left and whether or
5 not the government agrees with that.

6 Again, based upon my rulings. I understand the
7 government objects to my rulings, but what I'm going to ask
8 the government to do is, based upon my rulings and what I'm
9 saying remains to be at issue, what portion of the bank's
10 claim is now not in dispute anymore.

11 Does that make sense? And I'm hoping that -- to get
12 that fairly quickly, along with whatever the government is
13 proposing by way of limited additional discovery. All right?

14 I emphasize, limited, I don't know how many times,
15 but also in terms of time I'm expecting this back in -- fairly
16 quickly.

17 Obviously, I know next week is Thanksgiving, but --
18 I mean, this week is Thanksgiving, but you know, I don't
19 anticipate a lot of time going by and I don't also anticipate
20 -- I anticipate they would just be following whatever
21 additional discovery there was, supplemental letters to the
22 Court indicating what did or did not come out in that
23 additional discovery, and then I anticipate making an oral
24 ruling resolving the additional issues, and also then
25 obviously figuring out what the exact amounts would be. Okay?

1 MR. KOSTOLAMPROS: Sure, Your Honor. If I may?

2 We'd be prepared to file that letter as quickly as possible,
3 frankly.

4 So the other additional thing that I think is
5 important is, where do we go from here, right? I understand
6 the government may have an opportunity and may want to take
7 discovery, but at a certain point if our claim is recognized
8 up to a certain point as we've said, we don't think there's
9 value above a certain amount.

10 And frankly, the Danske would seriously consider,
11 you know, withdrawing those amounts if there's a dispute over
12 them, and we'd have to consider that.

13 But that leads to the next question of what do we do
14 next here. And I would suggest, Your Honor, at least we'd be
15 prepared to present in that letter, along with, you know, the
16 amounts that we think are at issue here, where the -- what the
17 bank's intention is and the bank is considering all options.

18 Obviously, number one, we'd like to see the
19 government just walk away from the property. But if not,
20 again, at a certain point we would suggest that the bank would
21 have the only interest here, given the value, and would seek
22 the Court's permission to foreclose on the property since it's
23 not getting paid any interest. You know, even our prior
24 discussions with the -- with the government.

25 So I guess the only thing that I'm suggesting, Your

1 Honor, is that if the parties can be prepared and present to
2 the Court the next steps. Obviously, the government will want
3 additional discovery but you know, from there, what happens
4 with the property?

5 Right now, this property is not paying its bills.
6 And, you know, the bank's -- the bank's lien -- and I think in
7 any other instance there would be a sale at this point, and
8 there would have been a sale before. And the government
9 hasn't foreclosed anything at this point.

10 THE COURT: Well, again, I hear what you're saying
11 and we understood at the time of the initial preliminary
12 order, the hope would be some type of interlocutory sale that
13 would take place.

14 I don't have an answer to your question. I think
15 it's a good idea that you propose what you -- the way you
16 were, you know -- which, from the bank's view should be -- how
17 it should proceed, and the government -- my hope, to the
18 extent that the lack of a court ruling with respect to the
19 bank's interest was holding up the government's ability to try
20 to agree to anything with the bank. I'm hoping that this
21 provides with that clarity, but I guess we'll find out. Okay?

22 MR. KOSTOLAMPROS: Sure, Your Honor.

23 THE COURT: All right. So do you -- when do you
24 want to put that letter in and, again, if you want to have the
25 dialog before you put that letter in with the government,

1 that's fine, but I'm going to have them, the government, put
2 in a letter following yours indicating what portion of the
3 letter they agree with is undisputed at this point and
4 proposing whatever limited additional discovery they think is
5 consistent with my ruling. Okay?

6 MR. KOSTOLAMPROS: Sure, Your Honor. I think we'd
7 be prepared to file this letter by the latest, a week from
8 today. And frankly, we might do it even earlier. So --

9 THE COURT: All right. That's fine. So a week from
10 today you'll file that letter and I'll give the government a
11 week to respond. All right?

12 And when I say respond, the government's letter
13 should indicate what they believe -- again, based upon my
14 rulings, what amount the bank -- is no longer in dispute with
15 respect to their superior interest, what amounts remain
16 disputed, and what specific discovery is the government
17 proposing with respect to the disputes that I've raised and
18 anything the bank puts in, in proposed -- in terms of moving
19 forward, the government can respond to as well if they have a
20 different view.

21 But I anticipate, then, having a conference call
22 later that week. We can probably even just set it right now,
23 where you know, we'll see where we stand on the numbers, and
24 we have a limited discovery the government seeks. I'll rule
25 on whether I think it's appropriate or not, and then we'll

1 take it from there. All right?

2 But the bottom line is, I anticipate this will be
3 resolved in weeks, not months. I'm looking at weeks. Okay?

4 MR. KOSTOLAMPROS: We hope so as well, Your Honor.

5 THE COURT: All right. I'm doing the best I can, I
6 can tell you that. So your letter will come in by November
7 30th, the government's letter by December 7th, and then we'll
8 have a phone conference on December 10th at 2:00 p.m. Does
9 that work for everybody?

10 MR. KOSTOLAMPROS: That works for me.

11 THE COURT: Is that okay for the government?

12 MS. O'CONNOR: One moment, Your Honor.

13 (Pause)

14 MS. O'CONNOR: Yes, Your Honor. I think you have
15 the restitutions scheduled the same day.

16 THE COURT: On December 10th? At what time? I
17 don't see that on my calendar, but there's --

18 MS. O'CONNOR: No, I -- Your Honor, it's November
19 30th. Fine for the government.

20 THE COURT: All right. All right. And obviously,
21 if anything comes up between now and then you can write a
22 letter to the Court, but I'm hoping we'll have much more
23 clarity by that date. All right?

24 MR. KOSTOLAMPROS: Yes. Thank you, Your Honor.

25 THE COURT: All right. Thank you, everybody. Have

1 a good day.

2 (Proceedings concluded at 11:59 a.m.)

3 I, CHRISTINE FIORE, court-approved transcriber and
4 certified electronic reporter and transcriber, certify that
5 the foregoing is a correct transcript from the official
6 electronic sound recording of the proceedings in the above-
7 entitled matter.

8
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10 _____ November 24, 2020

11 Christine Fiore, CERT

12 Transcriber

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